

CABINET FOR FAMILIES AND CHILDREN

DEPARTMENT FOR COMMUNITY BASED SERVICES

"An Equal Opportunity Employer M/F/D"



DIVISION OF CHILD SUPPORT



Information Release #828

TO: All IV-D Agents

DATE: May 1, 2000

SUBJECT: Legal Opinion CFC-OC-00-01 (March 20, 2000)

Venue for Prosecuting Obligor for Insufficient Funds Checks;
Failure to Prosecute Obligor for Insufficient Funds Checks;
Recovery of Payments from Employers for Insufficient Funds
Checks

A request for a legal opinion concerning insufficient funds checks was submitted to Office of the General Counsel on March 1, 2000. The areas of concern are listed above. The legal opinion request and the legal opinion were sent to the Service Region Administrators. The legal opinion is available from the Division of Child Support upon request by contacting Roberta Roach in the Technical Services Section. Legal Opinion CFC-OC-00-01 is summarized below.

I. Venue for Prosecuting Obligor for Insufficient Funds Checks

Policy in Information Release #781, dated February 10, 1999, specifies that if payment for a cold check is not made by an obligor within ten days of a request by the Division of Child Support (DCS) for restitution, the case is referred to the contracting official in the county where the check was written for collection of the amount of the cold check and the cold check fee. A legal opinion was requested because a number of contracting officials have expressed the opinion that venue for prosecuting obligors for issuing cold checks should be in the county where the check was received. Since the implementation of Kentucky's Centralized Collection Unit (CCU), which is located in Lexington, prosecuting in the county where the check was received would place a burden on the Fayette County Attorney's Office.

Legal Opinion CFC-OC-00-01 states that pursuant to Kentucky Revised Statute (KRS) 452.510 and KRS 452.550, venue for prosecution under KRS 514.040 (Theft by Deception) of child support obligors who write cold checks to DCS can be either in the county where the check is written or in the county where the check is received.

children first

However, venue in most cases appears to be more appropriate in the county where the check was written because this is more likely to be closer to the residence of the obligor. The prosecution of cold check cases in Fayette County, merely because the checks were received there, would be inappropriate, especially if the obligor wrote and sent the check from his or her county of residence which was some distance from Fayette County. The obligor could argue that he or she was denied a fair trial if the obligor is forced to defend his or her case at some distance from his or her residence.

In summary, Legal Opinion CFC-OC-00-01 states that the practice of DCS referring a cold check case for prosecution to the county attorney in the county where the check was written is not contrary to law and that these cases can be prosecuted where the check was written.

II. Failure to Prosecute Obligors for Insufficient Funds Checks

Issuing a cold check is a criminal offense that county attorneys have an obligation to prosecute. If the cold check amount is for \$300 or more, the county attorney usually refers the case to the Commonwealth's Attorney to prosecute since it involves a Class D felony. There are a number of contracting officials who do not want to take action against an obligor to recover the amount of a cold check and the cold check fee. DCS therefore asked Office of the General Counsel the following two questions.

1. What is the correct process for prosecuting an obligor if the IV-D contracting official is not a county attorney?

CFC-OC-00-01 specifies that a IV-D contracting official who is not a county attorney should submit the case to the county attorney for prosecution, along with the documentation and information that are necessary to prosecute the case. If the cold check is for \$300 or more, the contracting official should refer the case to the Commonwealth's Attorney. Whether or not the county attorney is the IV-D contracting official, the county attorney is obligated to prosecute cold check cases under KRS 514.040, independent of any Title IV-D responsibility.

2. If the contracting official is the appropriate entity and refuses to take action to recover the cold check amount and fee, what is the recommended course of action for DCS to take?

If the contracting official is the appropriate entity and fails to prosecute, then the official should be instructed as to the specific Program Administration Contract requirements which individually or collectively specify that the official is to take the appropriate action regarding cold check collection or prosecution. If this fails, either the Office of the Attorney General may be contacted to review the issue

of nonprosecution of cold check cases pursuant to KRS 15.715, or the matter may be referred to the Child Support Enforcement Commission for recommendations pursuant to KRS 15.290(5).

In addition, if cancellation of the Program Administration Contract is not a viable option for contracting officials who do not prosecute or otherwise attempt to collect the cold check amounts and fees, DCS may wish to consider incorporating an amendment into future contracts that will allow for the withholding of the cold check amounts and fees from the overall monies paid to contracting officials who, without good cause, refuse to take appropriate action for these cases.

III. Recovery of Payments from Employers for Insufficient Funds Checks

Another problem facing DCS is the recovery of cold check payments from employers. The employee has had the amount of the support payment withheld from his or her income and thus has satisfied his or her obligation to pay support. The employer, however, has failed to comply with KRS 405.467(9) as the employer has not forwarded to CFC "... that portion of salary or wages of the parent due and to be due in the future as will be sufficient to pay the child support amount ordered." Questions presented by DCS concerning the recovery of cold check amounts and fees from employers and a summary of answers contained in Legal Opinion CFC-OC-00-01 follow.

1. What is the recommended course of action against an employer to recover a cold check amount and the cold check fee?

CFC-OC-00-01 specifies that DCS should notify the employer about the check and afford the employer the opportunity to make payment according to the procedures contained in IR #781 that pertain to noncustodial parents or obligors. The statute addressing the dishonored check penalty, KRS 205.752, is applicable to the "payor" of a dishonored check, who could be either an employer or a noncustodial parent or obligor who is subject to an income withholding order.

If an employer does not make good on the dishonored check, DCS may refer the matter to the appropriate prosecutor. Employers, like child support obligors, are equally liable under state child support enforcement laws. The failure of IV-D contracting officials to take action against employers is a matter that can be brought to the attention of the Office of the Attorney General for appropriate intervention under its statutes.

2. In which county is legal action initiated against an in-state employer, the county in which the check was written or the county in which the check was received?

Action may be taken in the county where the check was written or received. In most cases, the more appropriate location is the county where the check was written.

NOTE: See the answer to Part I concerning venue for prosecuting obligors for insufficient funds checks.

3. In which Kentucky county is legal action initiated against an out-of-state employer?

It is difficult to perceive how a criminal prosecution can be conducted without the court having jurisdiction over both the subject matter and the defendant. However, the crime of writing a cold check may be viewed as having been completed when it is actually received and the Commonwealth and CFC experience the financial loss.

This position appears to be consistent with the statutes of the Kentucky Penal Code relating to territorial applicability and jurisdiction of the courts of this state to preside over prosecutions which may involve conduct occurring in other states.

KRS 500.060(1)(a) provides: "(1) Except as otherwise provided in this section, a person may be convicted under the law of this state of an offense committed by his own conduct or the conduct of another for which he is legally accountable when: (a) Either the conduct or the result which is an element of the offense occurs within this state; or . . ."

The issue of an out-of-state employer's compliance or noncompliance with an income withholding order is addressed by the Uniform Interstate Family Support Act (UIFSA) at KRS 407.5505 through KRS 407.5507, as it relates to direct enforcement without registration of the order.

Under KRS 407.5505, an employer of another state who willfully fails to comply with a Kentucky order would be subject to "penalties" for noncompliance consistent with the laws of the employer's state. It is not clear if the term "penalties" is intended to be civil or criminal or both under UIFSA. A cold check issued from an out-of-state employer is, in the opinion of the Office of the General Counsel, a form of noncompliance.

More extensive remedies may be available through the courts of another state under procedures addressing the registration and enforcement of income withholding orders, KRS 407.5601 through KRS 407.5614. KRS 407.5603(2) indicates that a Kentucky income withholding order that is registered with a tribunal of another state ". . . is enforceable in the same manner and is subject to the same procedures as an order issued by a tribunal . . ." in the other state. How a court of another state

would compel compliance or otherwise require an employer to make good on cold checks that the employer has issued would, therefore, depend upon the laws of the employer's state.

4. Does the action taken against out-of state employers differ from the action taken against in-state employers?

This question has been addressed in the context of the previous answers. Action taken against either in-state or out-of-state employers will not be successful without cooperation from prosecuting officials, including assistance from the Kentucky Attorney General, if necessary. Action against out-of-state employers also may require the assistance of child support agencies in other states and their contracting officials, especially if UIFSA is the basis for action.

5. What is the correct process for prosecuting an employer if the IV-D contracting official is not a county attorney?

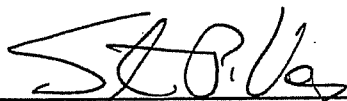
A case that requires criminal prosecution should be referred to the appropriate prosecuting official, either the county attorney in the case of a misdemeanor or the Commonwealth's Attorney in the case of a felony.

NOTE: See Part II, question 1.

6. How should an obligor's IV-D account be reflected when the employer sends a cold check to DCS and restitution has not been received?

The Office of the General Counsel views employers as being responsible for complying with income withholding orders and liable for the amounts not paid as ordered, based upon KRS 405.467(10) which states the "... employer shall be held liable to the cabinet for any amount which the employer fails to withhold from earnings due an obligor following receipt of an order to withhold earnings." This statute does not assign a joint or secondary responsibility to the obligor, nor does any other state law of which Office of the General Counsel is aware.

Appropriate DCS staff should determine how the employer's failure to make restitution is to be reflected on the obligor's IV-D account. However, any notation or reflection should not indicate that the obligor continues to be liable for the amount which should have been withheld and paid by the employer, so long as the amount was actually deducted from the obligor's earnings.


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